No. 626

IN THE

Supreme Court of the United States

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GEORGE W. GREEN, PETITIONER,

VS.

JOHN W. HOLLAND, AS UNITED STATES DISTRICT JUDGE FOR SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MANLEY P. CALDWELL,
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Of Counsel.

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PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, a resident and citizen of Reading, State of Pennsylvania, prays this court for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review a final judgment of said Court refusing to issue an order against the United States District Judge for the Southern District of Florida to show cause why he refuses to enter judgment as required by its unrecalled mandate ordering him so to do, said final judgment of refusal being entered on October 19, 1940.

STATEMENT OF MATTER INVOLVED.

Your petitioner originally instituted his suit in the United States District Court for Southern District of Florida, on negotiable notes, promissory notes under seal made by the City of Stuart, State of Florida, a municipal corporation, endorsed in blank and payable to bearer, and before your petitioner took said notes and when the same were not in default, the City of Stuart, then its duly authorized agents and officials, made a direct promise to your petitioner, a nonresident of Florida, to pay said notes and in consideration of said promise, your petitioner released a corporate debtor from an obligation it owed him, all of which will more fully appear from the record in the case of *George W. Green* v. *City of Stuart*, 81 F. 2d 968, Case No. 7695.

That the defendant in said cause made a motion for a directed verdict at the trial thereof and said motion was granted and thereby the defendant took said case from the jury and waived its right to a jury trial and thereby consented to the entry of final judgment against it should said case be reversed on appeal.

That said judgment was appealed and reversed and the court passed on all the questions involved, and announced its decision, whereupon the defendant petitioned for a rehearing and said petition was denied and said Circuit Court thereon sent down its mandate to the District Court and published its opinion, and the term passed and said mandate was never recalled and today lies in the files of said United States District Court for the Southern District of Florida.

That after said mandate came down, petitioner moved the District Court to enter final judgment according to said mandate and regardless of its waiver of right to ob-

ject by moving for a directed verdict, the defendant, City of Stuart, filed written objections to the entry of said judgment and filed a demurrer, and for the first time sought to question the jurisdiction of the Federal Court over the parties to said cause.

That the said District Court could not entertain such a suggestion, as its appellate court had already passed on its jurisdiction and found it had it, and wrote and published its opinion and denied and overruled said demurrer and entered judgment for the plaintiff.

Thereupon, the defendant appealed from said judgment on the ground the said District Court was without jurisdiction to enter same and the Circuit Court of Appeals for the Fifth Circuit allowed said appeal and thereupon reversed and attempted to set aside its own final judgment at another term, reversed the District Judge for doing what it had, by its unrecalled mandate, ordered him to do and at a time when it had no jurisdiction of the parties of the subject matter, as will more fully appear in 91 F. 2d 603, 113 A. L. R. 561.

That your petitioner prayed this court for a writ of certiorari in order that this court might pass on the novel method of procedure and contrary to Title 28, Section 347, United States Code, that made the first final and unrecalled or unreversed judgment of that court final; that said petition was denied and upon the coming down of the second mandate, the District Court vacated and set aside its final judgment and assessed the costs against your petitioner.

Thereupon, petitioner again appealed to the said Circuit Court of Appeals on the grounds the lower court had no jurisdiction to set aside said judgment or assess costs against your petitioner, but said appeal was denied as will appear in 101 F. 2d 309.

REASON FOR GRANTING WRIT.

Petitioner shows that by reason of the method of pleading in this cause and because the defendant did not have this Court by certiorari review the said first final judgment of said Circuit Court of Appeals and if incorrect, reverse same:

(1) Petitioner has been effectually deprived of his property in said notes.

(2) The Circuit Court of Apeals has disregarded or ignored Title 28, Section 347, United States Code, making its first judgment final.

(3) Because with said unrecalled mandate lying in the United States District Court, petitioner cannot sue and recover in any other court because a plea of former recovery can be proved and defeat his action.

That in consideration of the petitioner's situation and because by a novel method of legal manipulation, he was deprived of his property through the defendant's neglect or failure to ask for and obtain certiorari and have this court review said first decision and the failure of the Circuit Court of Appeals to observe the law and rule that its first judgment was final and could only be reversed by this court by writ of certiorari and not by the court that rendered it at another term and without control of its mandate.

The petitioner asked the court to enter judgment on the first mandate and disregard the later decisions of the Circuit Court of Appeals made at a time when it had lost jurisdiction to rule and showed the court that with the first mandate unrecalled and not reversed by any court with jurisdiction to do so, it was made impossible for petitioner to sue in any court and overcome a plea of former recovery and hence, unless judgment were

entered on said mandate, the petitioner would be deprived of his property, all because the defendant did not take a writ of certiorari from said final judgment.

That said District Court refused to enter said judgment and thereupon petitioner applied to the Circuit Court of Appeals for an order against said District Judge to enter a judgment on said mandate or show cause why he refused so to do and the Circuit Court refused to enter said order, but denied your orator's petition.

Petitioner, having no other remedy, applies to this court for certiorari, to review the record and proceedings in said cause because this method of procedure is unlawful and contrary to the rules and opens the way to destroy any value the Federal courts have as a forum to try such cases, and shows the Court in truth and fact he has been deprived of due process of law and his suit dismissed at the suggestion of the defendant at a time when he could not rebut and by a court that had lost jurisdiction to enter any valid order, and in so doing, the Circuit Court of Appeals decided a federal question:

(1) Contrary to Title 28, Section 347, United States Code.

(2) Contrary to all authority.

(3) Contrary to the applicable decisions of the Supreme Court.

(4) And has so far departed from the accepted procedure in an important matter affecting procedure generally throughout the country, as to call for the exercise of supervision by the Supreme Court.

And your petitioner respectfully prays a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send up to this Court for its review and

determination, on a day certain to be therein named, such part of the transcript and record in this case as it has not heretofore certified to this court and that the judgments of the Circuit Court of Appeals and the United States District Court for the Southern District of Florida entered after the United States Court had lost jurisdiction of this cause be declared null and void and the first final judgment of the United States Circuit Court of Appeals and the judgment of the trial court entered on said mandate be declared in full force and effect, and your petitioner have such other and further relief in the premises as to this Honorable Court may see meet and just.

This the 20th day of November, A. D. 1940.

MANLEY P. CALDWELL,
West Palm Beach, Florida,
Attorney for Petitioner.

BRIEF OF PETITIONER.

NATURE OF CONTROVERSY.

The main question involved here is,

> WHEN DOES THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS CEASE AND DOES IT HAVE THE RIGHT TO OPEN UP AND REVERSE ITS OWN JUDGMENTS AT LATER TERMS AND WHEN IT HAS NO CONTROL OF THE MANDATE?

The other question that grows out of this is,

> IF SUCH PROCEDURE RESULTS IN EFFECTIVELY CONFISCATING PETITIONER'S PROPERTY OR DEPRIVING HIM OF THE RIGHT TO SUE TO RECOVER HIS PROPERTY, CAN IT BE UPHELD?

Foreword.

In view of Rule 38, Section 5, of this Court, petitioner appreciates that this court is not interested in a case of this nature because there is a large amount involved, but is interested if it involves an important principle of law or is in conflict with the law as interpreted by this court. Petitioner feels the case here presented is absolutely without precedent, contrary to the law and every applicable decision of the Supreme Court, both as to the assumption of jurisdiction when it had none, and if this court can inquire into the Circuit Court's second judgment, if that Court did not in fact have jurisdiction of the parties at the trial when the non resident proved

that there was a novation and "he, the non resident, only took the notes from the City on its direct promise to him to pay them and in consideration of that promise, he released the corporation of an indebtedness it owed him."

The Circuit Court's decision as to whether a note made by a corporation and payable to a corporation or order and endorsed in blank prevented the holder in due course from suing thereon was novel as to construction of the assignee statute as the note following 113 A. L. R. 560 sets out. It was also novel because the court had already found the plaintiff was entitled to sue and recover in the Federal Court and had written its opinion and sent down its mandate, which it had not recalled and in fact reversed its own opinion at a later term when it had no jurisdiction.

But in addition to that, if it had any authority to inquire into its earlier judgment, it entirely overlooked the novation which the Federal Courts have always recognized under the assignee statute as authorizing the new non resident holder to sue them in the Federal Court.

Citizens Saving v. *Sexton,* 264 U. S. 310.
J. I. Case Co. v. *Pulaski County,* 210 Fed. 366.

The Circuit Court sought to sustain its authority to reverse its own judgment at a later term by citing as Authority:

Utah-Nevada Co. v. *DeLamar,* 113 Fed. 113, but that case in no way is any authority. That case was started in the State Court and removed *over the objections* of the plaintiff into the Federal Court, the suit was on a contract and not on a negotiable instrument and no final judgment was ever entered in the Federal Court, but the *case was remanded* to the State Court for trial.

The defendant never raised the jurisdictional question in this suit until the case was back in the District Court after appeal. The District Judge wouldn't reverse

the appellate court for assuming jurisdiction; the fact it wrote the opinion and sent down its mandate showed by implication it had passed on that question.

The court then went on to find the notes were past due when assigned. Even if they were, that was no reason for denying jurisdiction but the evidence was, the time of payment had been extended by agreement and the notes were not past due when assigned (p. 91 of record in 7695) and which was proved by the defendant. The Court then as grounds for holding it had no jurisdiction cited a number of cases in 91 F. 2d 563. While it entirely disregarded the novation feature the cases cited as blank endorsement of negotiable paper made by a corporation in no way sustained the holding and called for the note in A. L. R. In fact the note in A. L. R. points out that the cases cited by the court to sustain this ruling do not do so, but in fact only sustain the plaintiff.

The conclusion of that opinion, finding the District Court had no jurisdiction, was only a reversal of its former unreversed opinion that the District Court had jurisdiction and in effect ordered it to enter a judgment for Green which the Court did, and then reversed it for obeying its mandate.

Reference to the Reported Opinions in the Suit to Have the Lower Court Show Cause.

The Circuit Court gave no reason or authority to refuse the petition to ask the Judge to show cause why he failed and refused to enter judgment on its mandate.

Basis of Jurisdiction to Entertain Petition.

Mandamus lies to compel a court to exercise jurisdiction where it has dismissed the cause or refused to proceed on ground of supposed want of jurisdiction.

Grossmeyer, 177 U. S. 665, 4 A. L. R. 583.

Judge can be mandamused to enter final judgment in obedience to mandate of higher court.

Re National Park Bank, 256 U. S. 131.
U. S. v. *Moyer*, 235 U. S. 129.

We have repeatedly held *that no court* can set aside or alter its final judgments after the expiration of the term in which they are entered.

Title 28, Section 347, United States Code.

Where the sole ground of jurisdiction alleged is diversity of citizenship, the judgment of the Circuit Court of Appeals is final.

SPECIFICATION OF ASSIGNED ERRORS.

First Error.

THE CIRCUIT COURT WAS BOUND BY TITLE 28, SECTION 347, MAKING ITS FIRST JUDGMENT FINAL.

Second Error.

THE CIRCUIT COURT HAD NO JURISDICTION TO REVERSE ITS OWN JUDGMENT AT A LATER TERM.

Third Error.

THE CIRCUIT COURT ERRED IN REFUSING TO ORDER THE LOWER COURT TO SHOW CAUSE WHY IT FAILED AND REFUSED TO ENTER A JUDGMENT ON ITS UNRECALLED MANDATE.

ARGUMENT.

The three questions interlock and it is felt as each questions bears on the other a general statement covering all three may avoid confusion.

The main point at issue is,

WHEN DOES THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS TO REVIEW CEASE AND DOES IT HAVE ORIGINAL JURISDICTION TO REVIEW BY COLLATERAL ATTACK ITS OWN FINAL JUDGMENTS?

The motion to enter up a judgment in the lower court on the original mandate was made for two reasons.

As the plaintiff saw it, after the Circuit Court assumed jurisdiction, wrote its opinion and sent down its mandate, it lost all jurisdiction of the case and any orders it made thereafter were null and void. To cite its own statement in 101 Fed. 309:

> "The District Court, having no jurisdiction, could not have possibly rendered any binding judgment."

But the Circuit Court overlooked the fact that it had already found it had jurisdiction and ordered the lower court to enter judgment. So the petitioner can assume the same rule applies and the Circuit Court could not reverse its own judgment at a later term so those orders were void.

Justice Frankfurter's concurring opinion in *Graves* v. *N. Y.*, Volume 83, Number 12, Advance Sheet, page 585:

> "A reversal of a long current of decisions can be justified only if rooted in the Constitution itself."

Here we have an unbroken line of decisions from the earliest cases to the present day that hold the method herein adopted is not allowed. To justify this reversal, the C. C. A. cited *Utah-Nevada Co.* v. *DeLamar,* 113 Fed. 113, which in no way even approaches this question.

In that connection this Court recently granted certiorari in *Chicot County* v. *Baxter,* Volume 85, Number 5, page 277, Advance Sheets. The trouble there was that a judgment had been rendered and never reversed. Certain bondholders who were bound by that judgment initiated a suit on their bonds. The former judgment was pleaded as *res judicata.* The plaintiff's contention was that the law under which the judgment was entered was declared unconstitutional. This Court held that as the plaintiffs had not raised the question of the invalidity of the statute in the suit wherein the judgment was obtained they were bound. In sustaining this the Court cited *McCormick* v. *Sullivant,* 10 Wheat. 192, wherein it was contended that the decree of the federal district court did not *show that the parties to the suit were citizens of different states* and hence the suit was *coram non judice* and the decree void but this Court said,

> "But this reason proceeds upon the *incorrect view* of the character and jurisdiction of inferior courts of the United States. They are all of limited jurisdiction, but they are not on that account inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous and may upon appeal be reversed for that cause. But they are not absolute nullities."

This Court cited among other cases, *Skillern* v. *May,* 6 Cranch 267. In that case, after the mandate came down, the lower court attempted to point out to the appellate court the fact that the suit was between parties of the same state, but the court ordered its mandate obeyed.

In addition to the cases cited to support this rule, the petitioner cites: *Washington Bridge* v. *Stewart,* 3 How. 413; *Gaines* v. *Caldwell,* 148 U. S. 228; *Aspen* v. *Billings,* 150 U. S. 34; where facts are identical; *Hartog* v. *Memory,* 116 U. S. 558; *Deputoon* v. *Young,* 134 U. S. 241; *Greeley* v. *Lowe,* 155 U. S. 58; *Pittsburg* v. *Ramsey,* 22 Wall. 322; *Sanford* v. *Fork,* 160 U. S. 247; *Chaffin* v. *Taylor,* 116 U. S. 567; *Pacific R. R.* v. *Ketchum,* 101 U. S. 289; A. L. R. 730; *Richardson* v. *Pinsa,* 218 U. S. 289.

There is an unbroken line of decisions from the earliest day down to the present time with this one exception, that an attack of this nature cannot be maintained, and is so recognized by the text books.

3 Am. Juris., Secs. 994, 995, 998:

> "The decision on prior appeal is conclusive that *both the trial and appellate courts had* jurisdiction of the subject matter and the parties and the questions that might have been raised and were not, were set at rest even *though the objection not raised was the jurisdiction of the court.*" Sec. 1, A. L. R. 730.

That is the exact situation here. The record shows the Circuit Court had jurisdiction and found it had and this is supported by the record, on page 45 of the record, Case No. 7695, where the plaintiff testified he only took the notes on the City's promise to pay them and on page 90 of that record, the testimony was that in consideration for the City's promise, he released Osceola Golf Club of a debt it owed him. This had all the essential requirements of a novation set out in *Case* v. *Pulaski County,* 210 Fed. 366, and cited in Dobie on Federal Procedure, page 238.

It must therefore appear under the rule in *Bank of U. S.* v. *Moss,* 6 How. 47, and an unbroken line of decisions, *U. S.* v. *Moyer,* 235 U. S. 129—*National Park Bank,* 256 U. S. 131:

> "We have repeatedly held as to judgments of this Court, they cannot be changed at a subsequent term in matters of law whether attempted on motion or a *new appeal* on the mandate to the court below."

In this case, the judgment was questioned on appeal on the mandate and yet, the mandate still lay and is still in the Lower Court. But the rule is that not only cannot the judgment be reversed at another term, but in order to reverse it, the Court must recall the mandate before the term expires.

Snow v. *U. S.*, 118 U. S. 348:

> "As the case was decided at the present term and want of jurisdiction is clear, *we will recall the mandate* and vacate our judgment."

These decisions all lead to the situation in which the petitioner now finds himself. He cannot prosecute his suit to final judgment and obtain a mandate ordering its entry and then abandon that suit and sue in the State Court because he will be confronted with same situation as was Baxter State Bank in *Chicot County case, supra.* The defendant would plead *res judicata* by former recovery and the former judgment unreversed, with mandate in the lower court.

The plaintiff might attempt by replication to set up the later void judgments of the C. C. A. reversing its former final judgment at a later term.

The defendant would then rebut and cite the unbroken line of authority to show these later judgments were rendered by a court that had no jurisdiction and were void and the State Court would sustain this plea and as a result, the petitioner would be denied recovery in any court regardless of the fact the defendant owes the money, had the obligation validated by the State Legislature, page 35 of record in Case No. 7695; Chapter 14407, Special Acts, 1929, Florida Legislature, and through no fault of his own.

The trial Court inquired into its jurisdiction and found it had it, but entered a directed verdict for the defendant. The plaintiff appealed. The defendant filed no cross assignment of error raising the jurisdictional question because the record showed there was a diversity of citizenship.

Morton v. *Larney,* 266 U. S. 511:

> "If the allegations of jurisdiction are insufficiently stated, but the record shows facts to sustain it, the appellate court will consider the bill as amended and sustain the jurisdiction of the trial court."

Windholtz v. *Everett,* 74 F. 2d 834:

> "In every federal court action the question of jurisdiction is present whether raised or not and any ruling on the merits carries with it by implication a ruling on the jurisdiction."

After the Circuit Court found it had jurisdiction, passed on all the questions involved and sent down its mandate, the only relief the defendant could have lawfully obtained was to petition this court for certiorari. It did not do so, the term passed and when the plaintiff made his motion for entry of judgment on the mandate, then, for the first time the defendant raised the question of jurisdiction (page 32, record in Case No. 8437), and regardless of the rule in *Slocum* v. *N. Y. Life,* 228 U. S. 381.

Pacific v. *Faish,* 213 Fed. 448:

> "By making motion for directed verdict, the party waives his right to jury trial, and impliedly consents to the entry of a judgment against him, if the motion is granted and judgment reversed."

And as there were no issues left to try, the motion for final judgment (Page 28 of record in Case No. 8437) should have been allowed and no new trial granted. The lower Court held (Page 359 of record in 8437), the remaining issues were whether the notes were under seal and what a reasonable attorney's fee was for their collec-

tion, regardless of the fact their being under seal was not denied and they were under seal and in evidence (Page 47 of record in Case 7695) and testimony as to what a reasonable attorney's fee was in evidence and had not been questioned (Page 62 of record in Case 7695).

It was improper to review such questions again, but as long as the judgment entered (Page 41 of record in Case 8437) was in substantial compliance with the mandate, it was felt that upon entry of this judgment the case was at an end and the jurisdiction of the Federal Court ceased.

What the petitioner seeks to show is that the proceedings from that point on were novel and for which no allowance is made by either court rule or statute, but, on the contrary, all the law and decisions prevent.

The result that such method produces is to reserve a possible defense until such time as the plaintiff cannot be heard, the trial Court cannot reverse its superior Court for finding it has jurisdiction, the appellate Court loses jurisdiction after it sends down its mandate and the term closes. It cannot again review this question in that case because if it does and finds otherwise, it reverses its own decision at another term and the result of such procedure is to deny the plaintiff a recovery in any court regardless of the fact the unreversed judgment of the Circuit Court of Appeals is that the plaintiff is entitled to recover.

Re Parker, 120 U. S. 739, 7 S. Ct. 767:

> "The Writ of Mandamus properly lies in cases where the court refuses to take jurisdiction when by law it ought to do so."

This Court can appreciate the situation of the trial judge and the plaintiff. When the mandate came down on first final decree, that mandate ordered the court to enter judgment for the plaintiff. Upon entry of that judgment, the Federal Courts lost jurisdiction of the case as judgment had been entered in compliance with that mandate.

Upon the second appeal, the Circuit Court reversed the trial Court for doing what it had ordered, regardless of the fact it had not withdrawn its mandate and the term in which it rendered the judgment had long passed.

As the plaintiff saw the situation, the Circuit Court had no such right and its later judgments of reversal were *coram non judice,* so the plaintiff asked the trial Court to disregard such proceedings and enter judgment on the unrecalled mandate.

The District Court refused to do so on the ground the plaintiff could sue at law in the State Court, not that the mandate was not still in his Court and had not been recalled and reversed.

Petitioner appreciates the fact the novel construction of the Circuit Court as to its continuation of jurisdiction, placed the Trial Court in an uncomfortable position. It had obeyed its mandate and entered judgment and then was reversed for so doing. Now if it took the position the reversal was without authority, it might be held in error; if it did not enter judgment, it might be held in error. On the horns of this dilemma, it found the plaintiff could still sue in the State Court.

If the plaintiff had a right to sue in the Federal Court and the record shows it had that right, he had that election and made it and had a mandate that only required the entry of final judgment thereon. Could the plaintiff prosecute a suit to such a conclusion and then abandon its case and start a new action in the State Court?

15 R. C. L. 569, Sec. (2):

> "A judgment is the law's last word in a judicial controversy."

15 R. C. L. 581, Sec. 16:

> "As soon as a judgment is rendered, the rights of the parties are established and between them it is not necessary it should be entered of record."

If Title 28, Section 347, made the judgment of the C. C. A. in 81 F. 2d 968 final from which no appeal lay, either from the mandate or otherwise, *U. S.* v. *Mayer,* 235 U. S. 129, and under the law the only possible way this could be reversed was by this Court by certiorari and such method had never been pursued, then how could the plaintiff possibly prevail in the State Court over the objections of the defendant on a plea of former recovery, and was the unrecalled mandate not conclusive as to the right of the plaintiff to have judgment entered thereon?

The vistas that such method of procedure opens to conjecture are so vast as to undermine any value Courts may have and are so far reaching as to put in jeopardy any decision of the Federal Court entitled a final judgment. Collateral attacks on judgments are forbidden because, if successful, bring the Courts into disrepute and wrest vested rights from parties.

The law permitted the defendant to petition this Court for certiorari to review that first judgment if the defendant was not satisfied. It waived its right because no error appeared, but even had error appeared and it did not seek to have it corrected, it was bound.

This case sets a precedent to open the door to a method of defeating suitors in the Federal Court and make it impossible to recover in any court their obligations owed them and it is for this reason the petitioner feels certiorari should be granted, because unless reversed, any defendant in such a suit in the Federal Court can reserve such a possible defense, regardless of the record showing diversity of citizenship, and then present it at a time when the lower Court cannot entertain it and because it does not, the case is appealed and the appellate Court, being without jurisdiction, having already passed on the question, knocks the plaintiff out of court on a question on which he is not permitted to be heard and with its unrecalled mandate in the lower Court denies the plaintiff a recovery in any court.

Such proceeding is not due process of law and, if there be any statute to sustain it, such statute would be one of pains and penalties.

Petitioner shows that he prayed for alternative writ of mandamus under the rule in *In re Grossmayer*, 177 U. S. 665, and under the belief the new rules of Federal procedure only apply to actions of which the District Courts have original jurisdiction, but the pleading, if wrongfully entitled, could be considered as a petition for the rule.

Wherefore, the petitioner contends that after the Trial Court entered judgment in compliance with the mandate of the Circuit Court, the jurisdiction of the Federal Court ceased and he was entitled to have his judgment entered and undisturbed, the later rulings of both the Federal Courts were *coram non judice* and without force and effect and void and the appellate Court should have granted the rule against the District Judge.

MANLEY P. CALDWELL,
West Palm Beach, Florida,
Attorney for Petitioner.

CARROLL DUNSCOMBE,
Of Counsel.

Supreme Court of the United States

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OCTOBER TERM, 1940.

GEORGE W. GREEN, PETITIONER,

VS.

JOHN W. HOLLAND, AS UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MOTION TO STRIKE BRIEF OF CITY OF STUART.

MANLEY P. CALDWELL,
Attorney for Petitioner.

CARROLL DUNSCOMBE,
Counsel.

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VS.

JOHN W. HOLLAND, AS UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MOTION TO STRIKE BRIEF OF CITY OF STUART.

Petitioner moves to strike the brief of intervenor because no application was made to this court and granted for the City of Stuart to intervene or filed consent to appear *amicus curiae* in this cause under Rule 27 (9).

MANLEY P. CALDWELL,
Attorney for Petitioner.

REPLY BRIEF OF PETITIONER.

In reply to the brief of the intervenor and not waiving any rights to have the same stricken, petitioner takes exception to and calls the following to the court's attention:

STATEMENT OF CASE.

The allegation the notes in suit were delivered after maturity.

On page 90 the record in C. C. A., Case 7695, the City of Stuart, a corporation, *when defendant* in the district court, *introduced* the resolution which stated on July 6, 1928, when the novation was had and the City's notes transferred, "they were not in default the time of payment having been extended by mutual agreement with the City."

Coupled with this is Green's unrebutted testimony, page 45 of the record in Case 7695, "that before he took the notes he ascertained they were not in default and that the City told him before he took them the notes were good and it would pay them." These allegations are further borne out by the later resolution of the City recognizing the debt (page 49 of Record) and the act of the state legislature, Chapter 14407, Laws, 1929 (page 59 of Record) ratifying, validating and confirming it.

On the record it shows the notes were not in default and the estoppel appeared to deny them after the City had induced Green to take them on its direct promise to him to pay them and on the strength of that promise he released Osceola Golf Club.

The resolution and testimony not only shows an estoppel to deny but a complete novation and a new promise from a new debtor, one of whom, Green, was a nonresident.

The further objection is a Florida statute vitiated such a transaction.

The defendant filed no cross assignment of errors on appeal raising this question but raised it in its brief and the appellate court passed on this exact question in 81 F. 2d 968, and found there was no substance to the claim and that the defendant had the land and had not paid for it and a later city commission had ratified the purchase as did the legislature. The defendant asked for a rehearing on this question which was denied.

SITUATION AFTER FIRST REMAND.

After the appellate court rendered its opinion in 81 F. 2d 968 and sent down its mandate and the defendant, having made a motion for directed verdict and the same granted, and the case reversed, no further trial was necessary. This was so because of the rule the demurrer to the evidence was a waiver of trial but also because of the rule in *Slocum* v. *New York Life*, 228 U. S. 381; *Pacific* v. *Faish*, 213 Fed. 448.

> "By making such a motion, the defendant waives his right to a jury trial and impliedly consents to the entry of a judgment against him if the motion is granted and the judgment entered thereon is reversed."

When the first mandate came down the plaintiff made his motion (page 28 of Record in Case 8437) but instead of granting it, the district judge granted a new trial (page 29 of Record).

The defendant then filed its demurrer to the jurisdiction of the court over the parties (page 32 of Record) which only asked the trial judge to reverse his appellate court for assuming jurisdiction and which the court had to deny as an improper suggestion. The appellate court had assumed jurisdiction and written a full opinion and passed on all the questions involved (81 F. 2d 968) and,

therefore, the plaintiff asked the court to ascertain and state what issues remained to be tried. That the court had to construe the opinion and the mandate as to what further procedure was contemplated under the mandate and there were no issues to try, as the appellate court had passed on all the questions involved and to review these again was error. Thereupon, the court limited the issues as to whether the notes were under seal and what a reasonable attorney's fee was (page 35 of Record) in Case 8437, regardless of the fact there was no plea denying they were under seal and they were in evidence (page 47 of Record, Case No. 7695) and under seal and evidence unrebutted in the record that 10 per cent was a reasonable attorney's fee (page 62 of Record in Case 7695), all of which was admitted by the defendant's motion for a directed verdict. However, as the judgment finally entered was in substantial compliance with the mandate (page 41 of Record in Case 8437) the plaintiff contends that was the end of jurisdiction of the federal court.

The later appeals and decisions were void as rendered by courts that had lost jurisdiction.

AS TO ALTERNATIVE WRIT OF MANDAMUS

or

RULE TO SHOW CAUSE.

The rule in Florida and in the federal courts is that if the judge fails and refuses to assume jurisdiction because of some supposed want or lack, the proper remedy is by mandamus to make it appear to his superior court he has in fact jurisdiction but refuses because of some claimed impediment or want of process to exercise it and thus, refusal to proceed cannot be reviewed by appeal or writ of error. In this case, the later void judgments and decisions of the circuit court of appeals rendered

when it had lost jurisdiction of the case appeared as the impediment and petitioner recognizes that the district judge even though he felt the circuit court should not and did not have the power to reverse him for entering a judgment according to its mandate at a later term and when it had no jurisdiction to make any orders, still he could not reverse it for doing so, and he had to decline and the only way this error could be corrected if the circuit court could or would not enter the rule to show cause and correct it, was for this court to do so on certiorari.

Nelson v. *Indian Beach*, 147 So. 268, 109 Fla. 282:

> "If the judge exceeds his authority by attempting to vacate a final judgment at a time after such judgment has passed beyond his control to deal with the remedy is by mandamus to coerce the judge to undo his own wrong by reinstating the judgment so unlawfully interfered with by him." *State* v. *Wolfe*, 58 Fla. 523, 50 So. 511.

The notes in 4 A. L. R. 582, with the collection of federal and Florida cases, only support the petitioner's contention that in such a case mandamus is the only appropriate remedy.

Going back to the Nelson case, writ of error was taken from the order of the trial judge vacating a final judgment, but the *writ was dismissed* because the order vacating the final judgment was not a sufficient final judgment from which appeal or writ of error lay and there was no adequate remedy except by mandamus.

The records and published opinions of the circuit court of appeals show conclusively the district and appellate court had jurisdiction and wrote and handed down an opinion in 81 F. 2d 968, and it always had jurisdiction of the case on the novation feature, and did assume jurisdiction and then deny it, without recalling its mandate and so confiscated the petitioner's property in the notes.

The former writ of certiorari was denied, as Justice Holmes stated, its denial is in no sense an act affirming the decision. If the petitioner could not appeal from the order vacating his judgment and his only remedy was by mandamus, then this court may have refused to review because of such defect but in no way placed any stamp of approval on such method of procedure.

Williams v. *Capehart*, 54 So. 774, 777:

> "The fact that Capehart may have endeavored to appeal from the order of the county judge does not debar him from proceeding by mandamus."

The court will consider the petitioner is sailing over an uncharted sea in this proceeding. There are no precedents for such procedure or earlier decisions to guide as to just what the proper procedure is in such cases to obtain relief. The guide post is that where the only grounds of jurisdiction is diversity of citizenship, the judgment of the C. C. A. is final and that no court can reverse its own final judgments on second appeal or after it has lost control of its mandate and the term has passed in which the judgment was rendered.

Petitioner respectfully contends the district judge should be required to vacate his judgment quashing petitioner's judgment and reinstate the same.

Respectfully submitted,

MANLEY P. CALDWELL,
Attorney for Petitioner.

CARROLL DUNSCOMBE,
Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 626

GEORGE W. GREEN, Petitioner,

v.

JOHN W. HOLLAND, AS UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

BRIEF OF CITY OF STUART, A MUNICIPAL CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT

The proceeding here by the Petitioner is to compel the Respondent, John W. Holland, as United States District Judge for the Southern District of Florida, to reenter a Final Judgment against the City of Stuart, a political subdivision of the State of Florida, which Judgment under direction of the Circuit Court of Appeals for the Fifth Circuit had been heretofore set aside for lack of jurisdic-

tion of the District Court. Although the said John W. Holland is named Respondent, in effect the City of Stuart is actually the Respondent, and the action throughout, until this instance, has been against the City of Stuart.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals of the Fifth Circuit herein sought to be reversed, (R.9) is reported in the Advance Sheets of 114 F. (2d) 1018. This matter also appears in three other Appeals to the Circuit Court for the Fifth Circuit, and also in Petitions for Writs of Certiorari to the Supreme Court of the United States—81 F. (2d) 968, 91 F. (2d) 603, Case No. 480, 58 Sup. Ct. 146, 82 L.Ed. 575, 101 F. (2d) 309, Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510.

JURISDICTION OF SUPREME COURT

Jurisdiction of this Court is invoked by Petitioner under Section 240 (a) of the Federal Code (as amended by the Act of Congress Feb. 13, 1925, Chap. 229, Sec. 1; 43 Stat. 938).

Jurisdiction of the District Court was grounded solely on diversity of citizenship.

STATEMENT OF THE CASE

The City of Stuart, a municipal corporation of Florida, executed three promissory notes of $5,000.00 each, payable to the order of Osceola Golf Club, a corporation of Florida. After maturity Osceola Golf Club endorsed the notes in blank and delivered them to George W. Green, the plaintiff. Green, a citizen of Pennsylvania, sued the City upon these notes in the United States District Court for Southern Florida. The trial court awarded judgment against Green

because when the City executed the notes one of the City Commissioners was pecuniarily interested in the transaction. A Florida statute vitiated such a transaction. On appeal the Circuit Court of Appeals of the Fifth Circuit reversed this judgment in favor of the City and remanded the case for further proceedings. (Green vs City of Stuart, 81 F. (2d) 968).

Upon remand to the District Court the question of jurisdiction was raised and overruled, and thereupon Final Judgment was rendered in favor of Green against the City of Stuart. Upon the second appeal the jurisdictional objection was sustained. (City of Stuart v. Green, 91 F. (2d) 603). Green's Petition for Writ of Certiorari denied Nov. 8, 1937, 58 Sup. Ct. 146, 82 L.Ed. 575. Re-hearing denied Dec. 6, 1937, 58 Sup. Ct. 280, 82 L.Ed. 602.

After the Mandate of the Circuit Court of Appeals on the second Appeal was sent down, with directions to dismiss the suit for lack of jurisdiction of the District Court, the Final Judgment rendered in favor of Green was set aside, and a third Appeal was taken therefrom by Green to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the Order of the District Court setting aside the Judgment. (Green vs City of Stuart, 101 F. (2d) 309. Petition for Writ of Certiorari denied, Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510.)

Green then filed his Petition for Alternative Writ of Mandamus in the Circuit Court of Appeals for the Fifth Circuit (R. 1-2-3-4) to compel Holland, as District Judge, to reenter the former Final Judgment rendered by the said District Court in his favor against the City of Stuart, which Petition was denied (R.9) — In re United States of America ex rel. George W. Green, Relator, praying for a writ of mandamus, No. 9667, 114 F. (2d) 1018 (Advance Sheets). In this proceeding Green seeks to review this last ruling.

ARGUMENT

I The Ruling of the Circuit Court Refusing Writ of Mandamus Adhered To Its Previous Rulings and Which the Supreme Court Declined to Disturb by Its Denial of Petitions For Writs of Certiorari.

The Petitioner states in effect that the Circuit Court of Appeals of the Fifth Circuit reversed its own prior Final Judgement, when on its second Appeal it considered the jurisdictional question. But in no sense did it reverse itself. On the first Appeal it reversed a Judgment in favor of the City of Stuart, and remanded the case for further proceedings. The jurisdictional question was not raised or considered on the first Appeal. No Judgment had gone against the City when the jurisdictional question was invoked. The opinion of the Circuit Court of Appeals on the First Appeal required a re-trial; amended pleadings were offered and a new trial had, all before any Judgment went against the City. The question of jurisdiction was neither considered nor raised on the first Appeal, as made clear in the opinion in 81 F. (2d) 968. Such an objection however is one which cannot be waived, and may be raised by the parties at any time, or considered by the Court on its own Motion.

The jurisdictional principle invoked, which caused the Circuit Court of Appeals in the Second Appeal to direct the District Court to dismiss the suit for want of jurisdiction, was based upon the Federal Assignment Statute, as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said

note or other chose in action if no assignment had been made." (Act of March 3, 1911, c. 231, section 24(1), 36 Stat. 1091, 28 U.S.C.A. section 41(1).)

Jurisdiction had been challenged by the City of Stuart upon the ground that Green was not the original payee, but held the notes as assignee of the Osceola Golf Club, a corporation organized under the laws of Florida, which could not have prosecuted the suit in the Federal Court, even if no assignment had been made.

In this case (City of Stuart v. Green, 91 F. (2d) 603), the Circuit Court sustained this contention, and in its mandate ordered:

> "On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the suit for want of jurisdiction;
>
> It is further ordered and adjudged that the appellee, George W. Green, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court."

Green then filed Petition for Writ of Certiorari, which was denied November 8, 1937 (Case No. 480, 58 Sup. Ct. 146, 82 L.Ed. 575) and re-hearing denied December 6, 1937 (58 Sup. Ct. 280, 82 L.Ed. 602).

In compliance with this Mandate of the Circuit Court of Appeals, the District Court dismissed the suit for want of jurisdiction, and set aside the Judgment which it had previously entered against the City of Stuart, from which Green appealed, being the Third Appeal, in which the Circuit Court affirmed the Judgment of the District Court in Green v. City of Stuart, 101 F. (2d) 309 as follows:

"PER CURIAM.

> On the last appeal of this case to this court, 91 F. 2d 603, the mandate was 'that the judgment of the District Court in this cause be, and the same is hereby reversed, and that this cause be and it is hereby remanded to the said District Court with directions to dismiss the suit for want of jurisdiction.' This the District Court did, but in addition it ordered set aside a judgment which had previously been entered in the District Court after a reversal by this court. 81 F.2d 968. The judgment in the District Court of dismissal for lack of jurisdiction was in accordance with the mandate, and presents no possible error. The additional order setting aside the prior proceedings in the case, while not directed by this court, was a necessary consequence of it. The District Court, having no jurisdiction, could not possibly have rendered any binding judgment. It was proper for the District Court so to declare, and to expunge from its records the judgment improperly entered."

Green again filed his Petition for Writ of Certiorari, which was denied (Case No. 831, 59 Sup. Ct. 827, 83 L.Ed. 1510).

The Circuit Court's refusal to issue a Writ of Mandamus (No. 9667) 114 F.(2d) 1018, Advance Sheets,) was an adherence to its previous rulings, and to those of the Supreme Court in the cases herein cited. The matters argued by the Petitioner are not new, and have all gone before the Circuit Court and this Court in the previous cases. The Briefs of the City in opposition to the other Petitions for Writs of Certiorari are respectfully referred to.

II MANDAMUS IS IMPROPER REMEDY

Mandamus has been resorted to by Petitioner to restore a Final Judgment in his favor against the City of Stuart which had been set aside for want of jurisdiction of the

District Court. The authorities are clear that the action of mandamus under the circumstances as here involved is improper. A decision of an inferior Court cannot be reviewed or reversed by mandamus however erroneous it may be, or be supposed to be. (Ex parte in the matter of David A. Secombe, Sup. Ct. 19; How. 9-16; 15 L.Ed. 565.)

The case of Jonas Grossmayer, petitioner, (Sup. Ct. Reporter's Ed. 48-51; 44 L. Ed. 665) cited by the Petitioner here, sustains the position of the City rather than that of the Petitioner. In such case it appears that a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court and a final judgment of the circuit court of the United States for the defendant upon a plea to the jurisdiction cannot, therefore, be reviewed by writ of mandamus.

It would appear that a writ of mandamus can be granted in the United States Courts only after jurisdiction has been acquired. (Greene County v. Daniel, 102 U.S. 187; 26 L.Ed. 99; Labette County v. United States, 112 U.S. 217; 5 Sup. Ct. Rep. 108; 28 L.Ed. 698; Davenport v. Dodge County, 105 U.S. 237; 26 L.Ed. 1018).

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. (Ex parte Skinner & Eddy Corp. 265 U.S. 86; 44 Sup. Ct. Rep. 446; 68 L. Ed. 912).

It may be here stated that Paragraph (b) under Section 7, Rule 81 of the new rules of Federal Civil Procedure has abolished writ of mandamus.

It is plainly apparent that no reason, as prescribed under paragraph (b), Section 5 of Rule 38 of the Supreme Court, is shown by the Petitioner that would give him any right to a Writ of Certiorari.

CONCLUSION

We submit, therefore, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for City of Stuart.

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